

Martin-Brower Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 592. Cases 5-CA-12592 and 5-RC-11278

May 7, 1982

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On October 19, 1981, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ recommendations, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Martin-Brower Company, Fredericksburg, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as new paragraph 2(c) and reletter the following paragraphs accordingly:

"(c) Expunge from the personnel records, or other files, of Edward Nelson, Robert Cook, Edward Finney, John Jarrell, and Michael McCann any reference to their unlawful layoffs."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED with respect to the election conducted in Case 5-RC-11278 on September 7, 1980, that the challenges to the ballots

¹ Respondent and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² We find that it will effectuate the purposes of the Act to require Respondent to expunge from the personnel records, or other files, of Edward Nelson, Robert Cook, Edward Finney, John Jarrell, and Michael McCann any reference to their unlawful layoffs.

cast by Robert Cook, Edward Finney, and Michael McCann be, and they hereby are, overruled.

DIRECTION

It is hereby directed that the Regional Director for Region 5 shall, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots cast by Robert Cook, Edward Finney, and Michael McCann in the election conducted in Case 5-RC-11278 on September 7, 1980, and thereafter prepare and cause to be served on the parties a revised tally of ballots, upon the basis of which he shall issue an appropriate certification.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate employees concerning their or other employees' union activities.

WE WILL NOT interrogate employees with respect to how they will vote in a representation election conducted by the National Labor Relations Board.

WE WILL NOT threaten to transfer work to other facilities or lay off employees if they select International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 592, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT condition the return of transferred work or the recall of laid-off employees on the failure of union organizational efforts.

WE WILL NOT tell employees they are laid off because of their union activities.

WE WILL NOT transfer work to other facilities or lay off employees for the purpose of discouraging union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Edward Nelson, Robert Cook, Edward Finney, and Michael McCann reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, without prejudice to their seniority or other rights and privileges previously enjoyed by them, and make them and John Jarrell whole for any loss of pay they may

have suffered by reason of our unlawful layoff of them, with interest computed thereon.

WE WILL expunge from the personnel records, or other files, of Edward Nelson, Robert Cook, Edward Finney, John Jarrell, and Michael McCann any reference to their unlawful layoffs.

MARTIN-BROWER COMPANY

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This consolidated proceeding was heard before me in Fredericksburg, Virginia, on April 13, 14, and 15, 1981. The amended complaint in Case 5-CA-12592, based on charges filed on September 11, 1980,¹ alleges some independent violations of Section 8(a)(1) of the Act, and violations of Section 8(a)(3) consisting of the layoffs of Edward Finney, Edward Nelson, Robert Cook, John Jarrell, and Michael McCann, and a termination of Jarrell. Respondent denies any violations of the Act. The challenged ballots of Finney, Cook, and McCann are determinative of the results of the election held in Case 5-RC-11278 on September 7, and are before me for decision.

Upon the entire record² and my careful observations of the witnesses' demeanor as they testified, and after consideration of the able post-trial briefs filed by all parties, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a Delaware corporation engaged in the interstate and intrastate distribution of food and paper products for fast-food restaurants from its Fredericksburg, Virginia, location. During the 12 months preceding issuance of the complaint, a representative period, Respondent received gross revenues in excess of \$50,000 from its interstate transportation of freight. Respondent is an employer engaged in commerce and in operations affecting commerce as defined in Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. RESPONDENT'S SUPERVISORS AND AGENTS

The following persons occupied the positions set forth after their names in Martin-Brower's employ at the time of the events discussed in this Decision:

Raymond Hock—Eastern Regional Manager, National Accounts Division.

James Bards—Transportation Manager, National Accounts Division

William A. Wells—Director of Distribution, National Accounts Division

Rick Martin—Center Manager, Fredericksburg

Walter Pennino—Warehouse Supervisor, Fredericksburg

David Rodenroth—Transportation Manager, Fredericksburg

Ronald Curtis—Dispatch Supervisor, Fredericksburg

Leslie C. Randall, Jr.—Transportation Manager, Manassas Center

IV. THE ALLEGED UNFAIR LABOR PRACTICES³

A. Background

Edward Finney gave uncontroverted testimony that during an earlier union campaign in March 1979 he was questioned by Bill Wells⁴ and another man with respect to Finney's previous union affiliations. Later that day Finney's supervisor, Snyder, called Finney in and told him the others had thought Finney was a union organizer and had instructed him to fire Finney. Snyder then told Finney that he had told the others they were wrong, and that if Finney "let him down on his word," or accused him of being a liar, he would have Finney killed. It does not seem likely to me that Snyder would make such an extreme threat in the circumstances, but I have no sound reason to discredit Finney's recitation of these March 1979 occurrences. These events are beyond the statutory limitations period, but may be considered as background evidence to shed light on events within the period. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO; et al. (Bryan Manufacturing Company) v. N.L.R.B.*, 362 U.S. 411 (1960).

B. The General Picture and Some Preliminary Conclusions

In mid-April employee Brown was discharged, but this was reduced to a 1-week suspension. Shortly thereafter, within a week or two of Brown's return to work, driver

³ The facts set forth herein are based on a composite of the credited aspects of the testimony of all witnesses, the exhibits, and careful consideration of the logical consistency and inherent probability of the facts found. Although I may not advert to all of the record testimony or documentary evidence, it has been carefully weighed and considered. To the extent that testimony or other evidence not mentioned herein might appear to contradict the findings of fact, that evidence has not been overlooked but has been rejected as incredible, lacking in probative worth, surplusage, or irrelevant. *Bishop and Malco, Inc. d/b/a Walker's*, 159 NLRB 1159, 1161 (1966). There are testimonial inconsistencies on some peripheral matters, such as McCann's incredible claim that he and Rodenroth discussed how employees had voted before the election was held. I have noted them, but do not consider them to be so compelling as to diminish my credibility findings on other more substantive matters. It is a rare witness whose recollections are minutely correct on every item placed before him, and it is beyond cavil that a trier of fact may properly credit some of a witness' testimony without believing all of it. *N.L.R.B. v. Universal Camera Corporation*, 179 F.2d 749 (2d Cir. 1950), vacated on other grounds 340 U.S. 474 (1951).

⁴ I conclude Bill Wells is William A. Wells, Respondent's director of distribution, National Accounts Division. Wells did not testify, nor did Snyder.

¹ All dates herein are in 1980 unless otherwise specified.

² Certain errors in the transcript have been noted and are hereby corrected.

Michael McCann told Rodenroth that if there were a union Rodenroth would not be able to discharge Brown as he had. Rodenroth retorted that union or no union he would be able to fire him for the breach of company policy involved.

A few days prior to his conversation in regard to Brown's discharge McCann protested his assignment to Rodenroth, stating that if a union was in Rodenroth would have to send another driver. Rodenroth responded that a union would not tell him how to run his business.⁵

Respondent distributes products to fast-food enterprises. Red Barn is one of those distributees and was serviced out of the Fredericksburg terminal until August 1, 1980. Raymond Hock, Respondent's eastern regional manager in its National Accounts Division, credibly testified there were discussions in early 1980 with respect to moving the Red Barn account to Respondent's Columbus, Ohio, terminal. Pursuant to these discussions, Respondent in February prepared a profit plan for fiscal 1981, commencing July 1, 1980, which shows the Red Barn account in Columbus rather than Fredericksburg. Hock further credibly testified that the profit plan appears as it does because "we were going to consolidate the Red Barn business in Columbus."

An intracompany memo of May 6 sets forth the annual saving to be realized by a transfer of the account to Columbus. Thereafter, on May 27, Respondent's vice president and general manager of the National Accounts Division, D. J. Adzia, issued the following memo to National Sales Manager Dimos and Director of Distribution Wells:

SUBJECT: Red Barn Relocation—Fredericksburg to Columbus

We have discussed the need to identify the advantages and disadvantages of transferring the Red Barn inventory from Fredericksburg to Columbus since servicing those units from Columbus. We intended to make this change effective with the start of the new fiscal year which is only five weeks away. To date I have not seen any information regarding this subject. It is imperative that both of you sit down immediately to thoroughly analyze this subject so that we will make the correct decision on a timely basis.

Please have this information to me by no later than June 6, 1980.

Michael McCann signed a union authorization card on June 1. There is no evidence of union activity by Respondent's employees prior to that date.

⁵ I credit McCann's account of the discussion in regard to Brown because it was more complete and detailed than that of Rodenroth and appeared believable, but I credit Rodenroth that the incident occurred in April because he appeared to have the more certain recollection on the approximate date, and because Gregory Murphy affirms that Brown was reinstated prior to the start of the union movement, which I find commenced on or about June 1. I credit McCann's uncontroverted account of the work assignment conversation.

On June 17, Respondent issued route schedules for the delivery of Red Barn materials from Columbus, effective August 4.

On July 14, Respondent wrote the parent company of Red Barn confirming a meeting of July 9 wherein, *inter alia*, the movement of Red Barn service from Fredericksburg to Columbus, Ohio, and attendant benefits were discussed. The letter expresses a desire to transfer the work in early August upon receipt of Red Barn executive committee approval.

On July 16, the Union filed a petition (Case 5-RC-11278) for an election among Respondent's Fredericksburg drivers.

The last Red Barn shipment from Fredericksburg was on August 8 or 9.

A line-haul carrying frozen products had operated out of Fredericksburg since November 1978, and a line-haul carrying dry products was added in or about March 1980. Fredericksburg Transportation Manager Rodenroth credibly testified that the line-hauls originating at Fredericksburg had been profitable from their inception through their existence at Fredericksburg, and there is other credible testimony from employees that they had been apprised of this fact by management several times. Rodenroth denied having anything to do with the transfer of these hauls, and stated he first became aware of it in early July when the Fredericksburg center manager, Martin, told him of it.

The movement of the line-hauls apparently began with a phone call from Raymond Hock to James Bardo, transportation manager, National Accounts Division. According to Hock, at the end of June he asked Bardo to take a look at the Fredericksburg line-hauls "[b]ecause we were moving the Red Barn, we were eliminating the third shift⁶ and in conjunction with a major move like that, I asked him to take a look at that other part of the business." Bardo confirms that Hock asked him to look into the line-haul situation. Bardo testified that his department then made cost analyses of the line-hauls, dry and frozen, and discovered that movement of the hauls would result in savings of \$231.15 per week on the dry and \$227.15 per week on the frozen. Bardo reported back to Hock shortly after July 4 and told him of the cost differentials and various operating efficiencies which would warrant moving the line-hauls. Respondent proffered evidence of other efficiencies to be gained, including the elimination of weekend layovers at Fredericksburg with frozen goods and the avoidance of a security problem with loaded trucks sitting at Fredericksburg occasioned by elimination of the third shift which meant no employees on the premises during that shift.⁷

Hock asserted that he made the decision to move the line-hauls effective August 1. It appears there was little input on this decision by the management located at Fredericksburg. The cost efficiencies and some other operating efficiencies suggested by Bardo were not shown to

⁶ This refers to warehouse employees.

⁷ Bardo testified that the cost differential was the biggest factor in the dry line-haul decision, whereas the biggest factor in the frozen line-haul decision was the change in pickup time and origin for cold water fish which previously had to set over the weekend in Fredericksburg.

be matters under consideration by Hock when he asked Bardo to look into the possible move, and therefore were not premises on which Hock made his initial decision to explore the possibilities of removal.

When the line-hauls were in Fredericksburg one originated in Fredericksburg and went to Lenexa, Kansas. The other originated in Fredericksburg and went to Atlanta. On August 1, the dry line-haul originating point became Lenexa, Kansas, and the frozen line-haul originated at Atlanta. All of the line-hauls run in a circle and return to their same origination point with stops in between. In effect, all that Respondent did was reverse the Fredericksburg hauls to Atlanta and to Lenexa.

On August 18, the Regional Director for the Board's Region 5 approved a Stipulation for Certification Upon Consent Election⁸ in a unit of:

All drivers employed by the Employer at its Fredericksburg, Virginia location, excluding warehouse employees, office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

An election was subsequently held on September 7, wherein five votes were cast for the Union, six against, and three ballots were challenged by Respondent, those of Edward Finney, Robert Cook, and Michael McCann on the ground they were permanently terminated prior to the election.

Drivers Nelson, Cook, McCann, Finney, and Jarrell were all laid off within a period from the last part of July to mid-August. They were all told by Rodenroth that the layoffs were a result of the loss of the Red Barn account and the line-hauls. Rodenroth recalled telling each of the five men that their layoffs were indefinite. Cook agreed that he was told the layoff was indefinite. Nelson did not testify. Jarrell credibly testified that Rodenroth told him he might be recalled when business picked up and "this mess" was settled. McCann agreed that he understood his August 15 layoff was permanent.

Finney and Rodenroth had two conversations about Finney's layoff, one on or about July 31 and the other on or about August 15. On July 31, Rodenroth told Finney he would be laid off soon. Finney, who had on an earlier occasion been off on workmen's compensation because of a back injury,⁹ angrily retorted that his previous injury was due to company negligence and he would therefore go back on workmen's compensation. The next run Finney took, on August 7, he reported he had reinjured his back. Finney came to see Rodenroth on August 15 and was told he was laid off indefinitely. I find Rodenroth did not, as Finney claims, tell him he was "unofficially" laid off, but that Rodenroth did tell him he was indefinitely laid off, as he had the others.¹⁰ Finney subsequently applied for and got workmen's compensation even though Respondent contested it.

⁸ The Union signed the stipulation on August 6, and Respondent on August 8.

⁹ Finney had injured his back in August 1979 and was off work until March 1980.

¹⁰ Rodenroth was a more convincing witness than Finney on this point.

Of the five alleged discriminatees only McCann has been shown to be a union card signer, nor is there any evidence of union activity by any of them other than McCann, whose activity was minimal and clearly less than enthusiastic before his layoff.

Prior to the layoffs, Respondent terminated a temporary driver and did not replace him. At the time of the layoff, drivers Murphy and Charter were on sick leave. Both had more seniority than those laid off. Rodenroth credibly testified that he anticipated both would be back for the seasonal business increase before Christmas. Murphy has not yet returned, and Charter returned in January 1981. McCann was called back on November 14 for the Christmas rush only, but continues to work, according to Rodenroth, because another driver quit in December. McCann was the senior man on layoff, and seniority was followed in both the layoff and subsequent efforts to rehire. Jarrell was also rehired for the November 25 rush purportedly because neither Charter nor Murphy had returned from sick leave. The parties agree Jarrell was discharged for cause on February 12, 1981. Cook and Nelson were offered reemployment, Cook in March 1981. Cook and Nelson were offered reemployment, Cook in March and Nelson in April 1981, but both declined.

After the layoffs there were nine drivers. This remained constant until the Christmas season when the force increased to 10. There were 10 thereafter until April 1981, the week before the hearing, when it increased. No new drivers were hired between the layoffs and April 1981.

General Counsel's evidence of one run in August, three in September, one in October, and one in November wherein two drivers were used rather than one, advanced to show Respondent did not have to lay off drivers, loses considerable weight by reason of Respondent's reasonable explanations therefor and the further reason that six such incidents in a 4-month period would seem to be the exception rather than the rule. I do not consider this evidence significant either way in determining the need for a layoff. I find it considerably more significant that Curtis told Murphy, a few days after the election, that business was "really bustin', really booming, and he didn't know what he was going to do with all the product and routes that they had." This indicates Respondent could have utilized more drivers than they had in September.

C. The Termination of Jarrell at Manassas

Returning to Jarrell, it is alleged that he was unlawfully discharged at the Manassas facility on September 10 after he had gone to work there on August 26. I find and conclude that he was not unlawfully discharged at Manassas. Leslie Randall, transportation manager at Manassas while Jarrell was employed, credibly testified that when he hired Jarrell in August he expressly told him that Jarrell could work as long as they had work for him, and that when he let Jarrell go on September 10 it was due to a lack of work, which Jarrell was told. Randall also credibly stated that Jarrell was but one of 10 or 11 casuals hired commencing in June due to added work

for the Manassas terminal occasioned by a strike at Respondent's Philadelphia terminal, and that all casuals were terminated when the work decreased. Jarrell conceded that he was working at Manassas on an as needed basis and was not on the seniority board. I do not credit Jarrell¹¹ that Randall told him he was still needed but could not be kept because of corporate instructions. The evidence does not preponderate in General Counsel's favor with respect to the Manassas discharge allegation, and that allegation will be dismissed.

I now turn to a discussion of the alleged independent violations of Section 8(a)(1) of the Act.

D. Statements of Curtis to Murphy and Finney

Gregory Murphy and Edward Finney testified to two conversations with Ron Curtis when both were present. Murphy placed the first conversation around the end of June, but Finney recalls it was mid-July. Murphy impressed me as the more certain, and I conclude late June is probably correct. The second conversation occurred on or about July 31.

1. The first meeting with Curtis

With respect to the first meeting, Finney testified that pursuant to a rumor of an additional line-haul¹² he and Murphy asked if Respondent was going to add another line-haul. Curtis replied he had no knowledge about another line-haul, but the present line-haul would be kept because it was clearing \$1,800 per trip. Finney recalled no more of that conversation.

Murphy averred that he and Finney asked Curtis if the line-hauls would be cut if the Union came in, and received the reply that Curtis did not think the line-hauls would *then*¹³ be cut out because they were profitable, but he did think they would be cut if the Union came in because the Fredericksburg drivers would not cross picket lines at other of Respondent's locations if they were union.¹⁴ According to Murphy, Curtis asked if he knew anything about the Union coming in, and then volunteered that he, Curtis, knew McCann and another driver whose identity he did not know had started the Union. On cross-examination, Murphy explained that he and Finney inquired about the cancellation of line-hauls because of a rumor they would be cancelled if the Union came in, and added that Curtis said the line-hauls would probably come back after the union vote in September if they were cut prior to then.

Curtis did not specifically deny meeting with Finney and Murphy, but denied questioning any drivers about their union activities or those of others, or telling them the discontinuance of a line-haul was associated with union activity. He also denied telling Murphy or any driver that he knew who started the Union.

Murphy was a calm, collected witness whose testimony appeared unrehearsed, thoughtful, and credible. Fin-

ney's demeanor and recollection left much to be desired, and Curtis' testimony amounts only to general denials. I credit Murphy's account because he was far and away the best witness of the three on the basis of comparative demeanor, and because his testimony was much more complete, detailed, and believable.

Conclusion

Curtis is an admitted supervisor and agent. His actions are therefore imputable to his principal, Respondent. When Curtis questioned Murphy about his knowledge of the Union coming in, he was interrogating him about employee union activities without any justifiable reason shown. That Curtis was attempting to elicit the identity of union adherents is inferrable from his accompanying reference to McCann and another as known leading union adherents. Interrogation of this type has a reasonable tendency to interfere with and coerce employees in the exercise of their Section 7 rights and violates Section 8(a)(1) of the Act.¹⁵

Curtis, statements that the retention of the line-hauls was dependent on whether or not the employees selected a union to represent them also violated Section 8(a)(1) of the Act because they amount to a threat of cancellation if the Union were selected.

2. The July 31 meeting with Curtis¹⁶

Curtis told Murphy and Finney the line-hauls would be discontinued, and drivers would be laid off, because the Union was trying to organize. He then opined that the laid-off drivers might return depending on the outcome of the election,¹⁷ and that the line-hauls might be returned if the Union did not come in.

The statement that loss of work and driver layoffs would be the result of union organizational efforts amounts to a threat of such adverse consequences because of employee union activity, and violated Section 8(a)(1) of the Act. The accompanying remark conditioning the return of the lost work and concomitant return to work of laid-off employees on the failure of union organization conveyed the clear message that unless a majority of the employees forswore union representation the discontinued work and the laid-off employees would not return. The elements of interference with and restraint and coercion of employees in the exercise of their Section 7 right to form, join, or assist labor organizations are all present in Curtis' message, and his comments on July 31 therefore violated Section 8(a)(1) of the Act.

¹¹ See, e.g., *B. K. Restaurants Olean, Inc., d/b/a Burger King Restaurant*, 252 NLRB 465, 467 (1980) (actions of Lata).

¹² For the same reasons previously expressed, I credit Murphy's version of the July 31 conversation.

¹³ I do not credit Murphy that Curtis specifically mentioned a September election because the agreement for such an election was not entered into until August. The petition for such an election had been filed on July 16, prior to the conversation.

¹¹ As I note elsewhere in this Decision, Jarrell was not an overly impressive witness. Randall appeared more candid and believable.

¹² A line-haul is the transportation of goods by truck between Respondent's terminals located in various cities, as opposed to a direct delivery to a customer's place of business.

¹³ I conclude "then" refers to the time of the conversation.

¹⁴ Many of Respondent's terminals are organized shops.

E. Curtis and the Cooks

On July 30, Robert Cook was told by Rodenroth and Martin that he was indefinitely laid off because of lack of work.¹⁸ Nelson was also laid off on or about July 30.

According to Cook, about 5 minutes after his meeting with Rodenroth and Martin he and his wife talked to Curtis. His wife asked Curtis why the layoff. Curtis responded that the Company was laying off by seniority until they reached the "person that was causing the union." Cook asked if he would be called back, and Curtis said it was possible after the union vote. Cook did not mention this conversation with Curtis in his pretrial affidavit given on September 1980, which contains the statement, "[N]o one in management ever said anything to me about the Union." Cook first mentioned this meeting with Curtis in an affidavit given on April 11, 1981, 2 days before the hearing commenced. He explained that he did not report it earlier because it didn't seem important and he did not want to get Curtis, who was a friend, involved.

Mrs. Cook stated that her husband asked Curtis why he was laid off, and Curtis replied it was in order to get to the main person behind the Union. She said this person was identified by Curtis or Cook as McCann. She continued that Robert Cook asked how long he would be laid off and was told it would be at least until after the union vote.

Curtis testified that he had no social contact with Cook, but was friendly with him at work although he only saw him when he turned in his "paper work." According to Curtis, he did not know Cook was going to be laid off until after Cook and his wife left the premises on July 30. He denied talking to either Cook or his wife that day, and specifically denied ever making the statements attributed to him. He stated that he noted Cook was upset and had tears in his eyes when he came out of Rodenroth's office, rejoined his wife, and left.

Cook had no reason to ask Curtis for the reason for his layoff because Rodenroth had already given him one. This and the disagreement between the Cooks as to which asked Curtis why the layoff, the prior inconsistent affidavit of Cook, his unconvincing explanation of his failure to earlier mention such a significant incident, and the further fact that Curtis' testimony on the event appeared uncontrived and believable persuades me to credit Curtis' version. I find Curtis did not violate the Act as alleged in paragraph 5(g) of the complaint.

F. Statements of Rodenroth to Jarrell

John Jarrell testified that after he heard of the termination of the Red Barn account he asked Rodenroth, on or about August 6, if there was going to be a layoff. Rodenroth said there was. According to Jarrell, he also asked Rodenroth about the possibility of replacement work and the conversation gravitated to a conversation about company benefits.¹⁹ Rodenroth allegedly stated that the

¹⁸ Although Cook was told of his layoff on July 30, he actually worked through August 7.

¹⁹ Jarrell did not really explain how the question of benefits was raised.

benefits "could be pulled and they would have to be negotiated as part of the union contract agreement or the union agreement."

Rodenroth simply denied telling Jarrell his present benefits could be renegotiated.

The issue boils down to a conflict between a bare accusation bereft of any explanation as to how Rodenroth's alleged comment arose or related to the subject matter of Jarrell's inquiry and a bare denial. It is most unlikely that Rodenroth would, *sua sponte*, launch into a discourse on either the bargainability of benefits or the possibility of their discontinuance as part of a response to questions about layoffs and the availability of replacement work. Moreover, Jarrell was selectively evasive on cross-examination and left me with the overall impression that he was carefully avoiding any testimony potentially detrimental to his case. In short, I credit Rodenroth, not an outstanding witness from the standpoint of demeanor but superior to Jarrell on this point. Accordingly, the allegation in paragraph 5(c) of the complaint will be dismissed.

Jarrell further testified that when Rodenroth told him on August 16 that the next week would be his last because of lack of work due to loss of line-hauls and the Red Barn account, Rodenroth also advised that Jarrell might be recalled "when business picked up and this mess was settled."²⁰

Rodenroth's version was that he told Jarrell the Red Barn and line-haul work had been lost, and Jarrell would therefore be indefinitely laid off. Jarrell then asked about transferring to Respondent's Manassas, Virginia, facility, and Rodenroth replied that he had nothing to do with Manassas and could not tell him. Rodenroth denied telling Jarrell the men would be called back when "this mess" was cleaned up.

Noting that Jarrell did in fact go to work at the Manassas facility within a week or two after he completed his last workweek at Fredericksburg, I am persuaded he probably did inquire of Rodenroth regarding a transfer to Manassas, and I credit Rodenroth's testimony in that regard as well as his testimony that he told Jarrell he was going to be laid off indefinitely. Even so, Jarrell's testimony that Rodenroth said recall might occur when business picked up and "this mess" was settled appeared spontaneous and truthful, in contrast to some of his other testimony, and is credited over Rodenroth's denial.

"This mess" is ambiguous, but it is reasonable to conclude, in the absence of any other apparent mess and in accordance with the general principle that ambiguities are construed against the utterer, that Rodenroth was referring to the union campaign and the pending election.²¹ His statement thus amounts to an admission that the presence of union activity and the pendency of an election were controlling factors with respect to when Jarrell might be recalled. The statement was also reasonably calculated to convey to Jarrell the suggestion that he might be recalled if the Union disappeared from the scene. For these reasons I find and conclude Rodenroth's

²⁰ General Counsel misquotes the record which does *not* say "soon as this mess was settled."

²¹ The election agreement had been signed by Respondent on August 5.

statement had a reasonable tendency to interfere with Jarrell's Section 7 rights and violated Section 8(a)(1) of the Act.

C. The Pennino Incident

Michael McCann and his wife Joanne are friends of Warehouse Supervisor Walter Pennino, who frequently stops by their house. On September 2, Pennino dropped by shortly before noon. He and the McCanns became involved in a conversation wherein Pennino explained that the reason McCann was laid off was because Respondent thought he was the main organizer for the Union, and that Respondent only learned later that he was not. I do not credit Pennino's denials.²²

Pennino's statements may reasonably be said to have a tendency to interfere with employee²³ rights under the Act, and advising employees that their termination had been caused by their union activities is unlawful.²⁴ Accordingly, I find Pennino's assertion that McCann was laid off because Respondent considered him a leader in the union organization drive violated Section 8(a)(1) of the Act.

H. The Cook/Rodenroth Telephone Calls

Robert Cook had told Rodenroth during general conversations that he was satisfied and did not think the Union was necessary. Cook testified that Rodenroth called him on September 6, the day before the Board-conducted election, and asked if he had changed his mind about the Union. Cook replied he had not, and Rodenroth said that was all he was concerned about.²⁵ Rodenroth agreed that he did call Cook on September 6 but stated he only told him the election was on the morrow and he should come and vote.

Cook further testified that the union man called him after the election just to be talking and told him it was none of the Union's business how he had voted.²⁶

Mrs. Cook was not sure who called whom, but testified to a telephone call with Rodenroth on September 8 wherein he asked how her husband had voted and attempted to wheedle an answer from her when she declined to tell him.

Rodenroth claimed Mrs. Cook called him, told him the union man had called and asked how Cook had voted, and asked him what she should do. Rodenroth averred he answered that he had nothing to do with that and did not know, and denied asking her how Cook voted.

²² The McCanns' recollections of the conversation seemed vivid, uncontrived, and believable.

²³ Whether or not McCann was lawfully laid off, he remained a statutory employee on September 2. *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977).

²⁴ *Tennessee Cartage Co., Inc.*, 250 NLRB 112, 117-118 (1980) (statements of Atnip).

²⁵ Respondent's claim that Cook testified to a general conversation with Rodenroth regarding the Union on September 6 is incorrect. This occurred some time prior to that date.

²⁶ Respondent's statement in its brief that Cook testified the Union asked him how he voted, to which he responded it was none of their business is incorrect.

Conclusions

I do not credit Rodenroth that he contacted Cook to solicit him to vote,²⁷ noting that Respondent had already taken the firm position Cook and the other four laid-off men were permanently separated, and then followed through on this position by challenging Cook when he did appear to vote. On the other hand, crediting Cook requires an anomalous conclusion that Respondent challenged an employee it had reason to believe was not inclined to vote against the Union. This anomaly is alleviated by a recognition that had Respondent not challenged Cook's ballot its solid position that all five laid-off employees were permanently severed from the Employer would have been somewhat eroded. On the whole, although the matter is not entirely free from doubt, I am persuaded Cook's version should be credited. Accordingly, I find that Rodenroth violated Section 8(a)(1) of the Act by interrogating Cook about his current attitude toward the Union, and that his purpose was to ascertain how Cook would vote.

Rodenroth was, however, the more believable witness *vis-a-vis* his telephone conversation with Mrs. Cook, and I credit his version thereof. I have considerable difficulty, even though Robert Cook's testimony on the point is uncontroverted, in believing the Union called to inform him they did not want to know how he voted. It is more probable that the union man in fact asked Cook how he voted, and I am persuaded that Mrs. Cook indeed called Rodenroth and had the conversation Rodenroth testified to rather than vice versa.

I. Final Conclusions on the Layoffs and Challenged Voter Eligibility

The questioning of Finney by Wells during a 1979 union campaign and the concurrent statements of Snyder to Finney establish a recent background of Respondent hostility to union activity by its employees.

Curtis' statements to Murphy and Finney in June and July conditioning the retention of line-hauls and the recall of laid-off drivers on the success of union organization, Rodenroth's comment to Jarrell in August conditioning possible recall on the failure of the Union; and Pennino's statements to McCann that his layoff was due to his suspected union activities *prima facie* show that protected conduct was a motivating factor in Respondent's decision to discontinue the line-hauls and lay off drivers. Moreover, Curtis' statement to Murphy and Finney in June that he knew McCann and another had started the Union establishes that the Employer had knowledge of union activity and thought he knew the identity of employees involved therein before Curtis' meeting with Murphy and Finney, and thus before or contemporaneously with Hock's request to Bardo in the last week of June to look into the line-haul situation. Hock conceded, as did Bardo, he was aware of the union presence in the summer of 1980. In addition, Bardo heard of it from William Wells. The evidence is sufficient to warrant a finding that Respondent knew there

²⁷ Nor do I credit Rodenroth that he urged laid-off employees Finney, Murphy, and McCann to vote.

was union activity present, and at least suspected McCann as a participant,²⁸ prior to Hock's request to Bardo.

Under the *Wright Line* principle²⁹ the burden now shifts to Respondent to show that it would have taken the same action in the absence of the protected activity.

Contrary to General Counsel, I conclude the discontinuance of the Red Barn account was not effected for unlawful reasons. Respondent has convincingly shown that the move of the Red Barn account was the result of an orderly progression of events beginning in February 1980, long before any union activities, and proceeding to their predetermined conclusion. I do not, however, believe that the record supports a conclusion that any of the alleged discriminatees would have been laid off had not the line-hauls been moved. There is some testimony indicating that only four drivers were needed for the two discontinued line-hauls, which would imply that Nelson, the least senior and first laid off, was laid off due to the loss of Red Barn. The layoffs are not that easily divisible and attributable to one or the other of the business losses. Rodenroth told Nelson, as well as the others, that he was laid off because the Red Barn account *and* the line-hauls had been lost. The loss of line-hauls was therefore advanced as a determining factor in Nelson's layoff as well as the others. The burden falls on Respondent to prove otherwise, and it has not proffered anything to contradict or clarify Rodenroth's pronouncement of the reasons.

The record is replete with evidence that Respondent reaped monetary and other benefits from transferring the line-hauls. The fact that advantages were realized as a result of the line-haul transfers is not very persuasive evidence of employer motivation because there is no convincing showing that Hock was aware of or even contemplating the specific benefits that eventually accrued to Respondent *after* the transfer when he set the investigation in motion. He only became aware of the monetary and other advantages when Bardo reported back to him.

Hock's reasons for looking into the possibility of removing the line-hauls are vague and unconvincing,³⁰ and are not credited. There was no impetus from local management for this investigation, nor was there even any solicitation of Rodenroth's opinion before Hock started the wheels moving and made the final decision on his own initiative. Bardo conceded that local management is usually consulted when line-hauls are involved, and that Rodenroth was the local management concerned in this case. Rodenroth credibly asserted he had no participation in the decision to move the line-hauls, which he credibly averred were always profitable while they were located at Fredericksburg. Hock's decision to move the line-hauls was made solely on the basis of Bardo's telephone report.

²⁸ McCann's April comments to Rodenroth about a union were sufficient cause for Respondent to suspect him of being an activist when Respondent learned of the union presence in June.

²⁹ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

³⁰ Hock's stated reasons are:

Because we were moving the Red Barn, we were eliminating the third shift and in conjunction with a major move like that, I asked him [Bardo] to take a look at that other part of the business.

The combination of a background of strong employer hostility to unions and independent violations of Section 8(a)(1) of the Act in this case; the statements of Rodenroth, Pennino, and Curtis with respect to line-hauls and layoffs; Hock's unconvincing reasons for initiating an investigation into the possibility of line-haul transfer; the timing of Hock's sudden initiative shortly after or contemporaneously with Respondent's gaining knowledge of employee union activity; the rapidity of Hock's decision to implement the transfers; the failure of Hock to consult with anyone but Bardo before deciding to implement the transfer; and the profitability of the line-hauls throughout their tenure at Fredericksburg easily outweigh Respondent's defense which essentially consists of reliance on business advantages Respondent realized after the line-haul changes were made, but were not known to Hock when he first set out to change them. I am persuaded that Hock had decided to remove the line-hauls because of the existence of union activity and to discourage such activity before he talked to Bardo, and only talked to Bardo for the purpose of obtaining colorable reasons to excuse actions already decided upon. Accordingly, I conclude and find Respondent's asserted reasons for moving the line-hauls are excuses rather than reasons, and are pretexts developed after the fact. This being the case, Respondent has not met the *Wright Line* test by demonstrating that the line-hauls would have been transferred or five employees laid off in the absence of protected activity. Moreover, the pretextual nature of the proffered defense with respect to line-haul moves warrants an inference of unlawful motivation. *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966); *Wellington Hall Nursing Home, Inc.*, 257 NLRB 791 (1981).

It necessarily follows that the layoff of five employees as a result of an unlawfully motivated transfer of work violated Section 8(a)(3) and (1) of the Act. I further find, in the absence of some convincing showing of a legitimate necessity for the layoff and considering that Respondent viewed McCann as a leading union protagonist, that the evidence preponderates in favor of a conclusion that Respondent selected Nelson, Cook, Finney, and Jarrell for layoff in order to reach McCann for layoff and yet preserve the facade of a fair seniority controlled layoff. A method of selection for layoff designed to eliminate an employee perceived to be a union activist is itself violative of Section 8(a)(3) and (1) of the Act.³¹

Respondent takes the position that Edward Finney, Robert Cook, and Michael McCann were not eligible voters in the September 7, 1980, election because they were permanently terminated prior to the election date. The Union contends they are eligible and the challenges to their ballots should be overruled. These employees were unlawfully laid off and were therefore eligible to vote in the September 7, 1980, election.³² The challenge

³¹ Respondent's recall efforts *after* the complaint issued are matters to be considered in the compliance stage of this proceeding and have no probative weight as a defense to the unfair labor practices found herein.

³² *Jacques Syl Knitwear, Inc.; Biquette, Inc.*, 247 NLRB 1525, 1533 (1980).

to their ballots is overruled and they shall be opened and counted as hereinafter provided.

Upon the foregoing findings of fact and conclusions based thereon, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, Martin-Brower Company, is an employer engaged in commerce and operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union activities or those of others, Respondent violated Section 8(a)(1) of the Act.

4. By interrogating an employee with respect to how he would vote in a National Labor Relations Board-conducted election, Respondent violated Section 8(a)(1) of the Act.

5. By threatening to transfer line-hauls to other facilities and lay off employees if they select the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act.

6. By conditioning the return of transferred work and recall of laid-off employees on the failure of union organizational efforts, Respondent violated Section 8(a)(1) of the Act.

7. By telling an employee he was laid off because of his union activities, Respondent violated Section 8(a)(1) of the Act.

8. By transferring line-hauls from Fredericksburg, Virginia, to other locations and laying off Edward Nelson, Robert Cook, Edward Finney, John Jarrell, and Michael McCann for the purpose of discouraging union membership and activity, Respondent violated Section 8(a)(3) and (1) of the Act.

9. Respondent has not committed any other unfair labor practices alleged in the complaint.

10. Edward Finney, Robert Cook, and Michael McCann were eligible to vote in the representation election conducted in Case 5-RC-11278 on September 7, 1980.

THE REMEDY

In addition to the usual cease-and-desist order and notice posting, I shall order Respondent to offer Edward Nelson, Robert Cook, Edward Finney, and Michael McCann unconditional reinstatement to their former jobs, or substantially equivalent employment if those jobs no longer exist, and make them and John Jarrell³³ whole for all wages lost by them as a result of their unlawful layoff, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*,

³³ The parties agree John Jarrell was terminated for cause by Respondent subsequent to his reemployment by Respondent. Reinstatement of Jarrell is therefore not now appropriate, and his backpay is tolled as of February 12, 1981, the date of his discharge for cause. (See Sec. 10(c) of the Act.) The adequacy of any offers of reinstatement previously made shall be determined at the compliance stage of this proceeding.

90 NLRB 289 (1950); and *Florida Steel Corporation*, 231 NLRB 651 (1977).³⁴

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³⁵

The Respondent, Martin-Brower Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their or other employees' union activities.

(b) Interrogating employees with respect to how they will vote in a Board-conducted election.

(c) Threatening to transfer work and/or lay off employees if they select a union as their collective-bargaining representative.

(d) Conditioning the return of transferred work and/or the recall of laid-off employees on the failure of union organizational efforts.

(e) Telling employees they are laid off because of their union activities.

(f) Transferring work to other facilities and/or laying off employees for the purpose of discouraging union membership or activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer Edward Nelson, Robert Cook, Edward Finney, and Michael McCann immediate and full reinstatement to their former jobs, or substantially equivalent employment if those jobs no longer exist, without prejudice to any seniority and other rights and privileges previously enjoyed by them.

(b) Make Edward Nelson, Robert Cook, Edward Finney, John Jarrell, and Michael McCann whole for any loss of pay they may have suffered by reason of their unlawful layoff. Said backpay shall be computed in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its Fredericksburg, Virginia, facility, copies of the attached notice marked "Appendix."³⁶ Copies of

³⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

³⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

said notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized agent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that Case 5-RC-11278 be, and it hereby is, severed from this consolidated proceeding and referred to the Regional Director for Region 5 for the purpose of opening and counting the ballots of Edward Finney, Robert Cook, and Michael McCann, preparing and issuing a revised tally of ballots to be served on the parties, and issuing and appropriate certification.